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PRIVATELY-FINANCED INFRASTRUCTURE PROJECTS

Draft chapters of a legislative guide on privately-financed infrastructure projects

Report of the Secretary-General

Addendum

Chapter I. SCOPE, PURPOSE AND TERMINOLOGY OF THE GUIDE

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A. Transactions covered by the *Guide*

1. Privately-financed infrastructure projects are transactions pursuant to which the national, provincial or local Government engages a private entity to develop, maintain and operate an infrastructure facility in exchange for the right to charge a price, either to the public or to the Government, for the use of the facility or the services or goods it generates.

2. The transactions covered by the *Guide* may be used for the private financing of various types of facilities, including, for example, power-generation plants, facilities for treatment of waste water or supply of potable water, toll roads, railways, airports, telecommunication networks. Generally, the transactions covered by the *Guide* relate to infrastructure facilities that are destined to be used by the public or that generate some form of commodity or provide some form of service to the public. Not covered in the *Guide* are transactions for the "privatization" of State property or functions by means of the sale of State property or shares of State-owned entities to the private sector. Furthermore, the *Guide* does not cover transactions for the exploitation of natural resources, such as oil or mining "concessions" or "licences".

B. Purpose of the *Guide*

3. The purpose of the *Guide* is to assist national Governments and legislative bodies in reviewing the adequacy of laws, regulations, decrees and similar legislative texts relating to transactions for the private financing, construction and operation of public infrastructure facilities.

4. The *Guide* sets out a number of issues often addressed in national laws and regulations pertaining to privately-financed infrastructure projects, which were taken into account in the preparation of the *Guide*. The *Guide* discusses the desirability of dealing with those issues in legislation and offers examples, as appropriate, of possible legislative solutions on certain issues. The thrust of the advice provided in the *Guide* is to achieve an appropriate balance between the need to attract private investment for infrastructure projects and the need to protect the interests of the host Government or the users of the infrastructure facility. The *Guide* does not provide a single set of model solutions for the issues considered, but helps the reader to evaluate different approaches available and to choose the one suitable in the national context.

C. Terminology used in the *Guide*

5. The following paragraphs explain the meaning and use of certain expressions that appear frequently in the *Guide* or which are often used in national laws or writings in connection with privately-financed infrastructure projects. For terms not mentioned below, such as terms of art used in financial and business management writings, the reader is advised to consult other sources of information on this subject, such as the *Guidelines on Infrastructure Development through*

Build-Operate-Transfer (BOT) Projects prepared by the United Nations Industrial Development Organization (UNIDO).1/

1. Build-operate-transfer (BOT) and related expressions

6. A public infrastructure project is said to be a "build-operate-transfer" (BOT) project when the host Government selects a private entity to finance and construct an infrastructure facility and gives the entity the right to operate the facility commercially for a certain period, at the end of which the facility is transferred to the Government. Usually the host Government holds title to the facility and the land on which it is built. However, the parties may provide that the private entity will own the facility until it is transferred to the host Government, in which case the project is referred to as a "build-own-operate-transfer" (BOOT) project.

7. One variation of BOT projects are the "build-rent-operate-transfer" (BROT) projects or "build-lease-operate-transfer" (BLOT) projects, where, in addition to the obligations and other terms usual to BOT projects, the private entity rents the physical assets on which the facility is located for the duration of the agreement. In some projects, such as the "build-transfer-operate" (BTO) projects, it is expressly provided that the infrastructure facility becomes the property of the host Government immediately upon its completion, the project company being awarded the right to operate the facility for a certain period.

8. "Build-own-operate" (BOO) are projects in which, as in BOOT projects, a private entity is engaged for the financing, construction, operation and maintenance of a given infrastructure facility in exchange for the right to collect fees and other charges from its users. However, under this arrangement the private entity permanently owns the facility and its assets and is not under an obligation to transfer them back to the host Government.

9. A similar arrangement is the "design-build-finance-operate"(DBFO) modality, which also entails ownership of the infrastructure facility by the private sector, and in which the private sector assumes the additional responsibility for the design of the facility.

10. There are also arrangements whereby existing infrastructure facilities are turned over to private entities for being modernized or refurbished, operated and maintained, permanently or for a given period time. Depending on whether the private sector will own such infrastructure facility, those arrangements are called either "refurbish-operate-transfer" (ROT) or "modernize-operate-transfer"(MOT), in the first case; or "refurbish-own-operate" (ROO) or "modernize-own-operate"(MOO) in the latter case.

11. Sometimes all of the above transactions and other possible forms of privately-financed infrastructure projects are generally referred to with the acronym "BOT". In the *Guide,*

1/ United Nations Industrial Development Organization, *Guidelines for Infrastructure Development through Build-Operate-Transfer (BOT) Projects*, Vienna, 1996. (UNIDO Sales Publication No. UNIDO.95.6.E) (hereafter referred to as the *"UNIDO BOT Guidelines"*).

however, the term "BOT" is only used in reference to the particular type of privately-financed infrastructure projects described in paragraph 6.

2. "Project agreement" and related words

12. As used in the *Guide*, the words "project agreement" mean an agreement between the host Government and the private entity or entities selected by the host Government to carry out the project, and which sets forth the terms and conditions for the construction or modernization, operation and maintenance of a public infrastructure facility.

13. The expression "project sponsors" refers to the group of companies that submit a joint proposal or tender for the development of an infrastructure project and agree to carry it out jointly if awarded the project by the host Government.

14. The words "project consortium" are used in the *Guide* in a narrow sense to refer to an unincorporated joint venture created by the project sponsors for the specific purpose of carrying out the project, when the laws of the host country do not require the establishment of an independent legal entity for that specific purpose (see chapter V, "Preparatory measures", paras. 29-37). The words "project company" are used to refer to the independent legal entity established by the project sponsors for the purpose of carrying out the construction works and operating the infrastructure facility.

3. "Concession" and related terms

15. When some writings or legislative texts refer to privately-financed infrastructure projects, they may use expressions such as "concession", "franchise", "licence" or "authorization". In some national laws, particularly those pertaining to the civil law tradition, certain forms of privately-financed infrastructure projects are referred to by well-defined legal concepts such as "public works concession" or "public service concession". These concepts are governed by elaborate provisions that are part of a specific body of law, typically referred to by expressions such as "administrative law". In other national laws, however, privately-financed infrastructure projects do not fall under a separate body of law and are dealt with by rules governing the activity to which the project pertains.

16. The *Guide* uses the word "concession" to refer generally to the right given to the project company or consortium to construct and operate the public infrastructure facility and to charge for its use or for the services or goods it generates. As used in the *Guide*, the word "concession" is not to be understood in a technical meaning that may be attached to it under any particular legal system or national laws.

17. The expressions "concession agreement" and "concession contract" are used in some legal systems to refer to the agreement between the host Government and the project company or consortium setting forth the conditions for the implementation of the project. In the *Guide* the words "project agreement" are used in that meaning.

18. Another related term is the word "concessionaire", which often is used to refer to the private entity which is awarded the concession by the host Government. When used in the *Guide*, such word is a synonym of "project company" or "project consortium".

4. Host Government and related expressions

19. The expression "host Government" is generally used in the *Guide* to refer to the national, provincial or local authority which has the overall responsibility for the project and on behalf of which the project is awarded.

20. The term "procuring entity" is used in the *Guide* to refer to the organ, agency or official within the host Government which is responsible for selecting the project sponsors and awarding the project. Depending on the system of the host country, more than one organ, agency or official may be involved in the selection process and related procedures leading to the award of the project.

21. The expression "regulatory body" is used in the *Guide* to refer to the governmental organ or entity, or a body created by statute, that is entrusted with the authority to issue rules and regulations governing the operation of the infrastructure facility. In some countries, that authority is vested in the procuring entity itself.

5. Lenders and international financial institutions

22. The word "lenders", as used in the *Guide*, refers to public or private financial entities which extend loans for the implementation of the project.

23. The *Guide* uses the words "international financial institutions" to refer to intergovernmental organizations that may provide funds or financial guarantees to the implementation of development projects, such as the World Bank, the International Finance Corporation, the Multilateral Investment Guaranty Agency, as well as regional development banks, such as the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, or the Inter-American Development Bank. When no distinction is made in the *Guide*, the word "lenders" includes international financial institutions providing loans to the project.

6. Turnkey contract

24. The *Guide* uses the term "turnkey contract" to refer to a construction contract whereby a single contractor is engaged to perform all obligations needed for the completion of the entire works, i.e. the transfer of the technology, the supply of the design, the supply of equipment and materials, the installation of the equipment and the performance of the other construction obligations (such as civil engineering and building).2/ In a turnkey contract, the contractor is

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2/ The notion of turnkey is discussed in the *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works*, New York, 1988, United

normally obliged to undertake all necessary works so that the purchaser receives a facility which is ready for being put to operation.

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Nations Publication, Sales No. E.87.V.10 (hereafter referred to as the "*UNCITRAL Construction Legal Guide*"), p. 16.